

***United States Court of Appeals
for the Second Circuit***



**RESPONDENT'S
BRIEF**

77-4049

United States Court of Appeals
FOR THE SECOND CIRCUIT

GENERAL DYNAMICS CORPORATION, ELECTRIC BOAT DIVISION,

Petitioner,

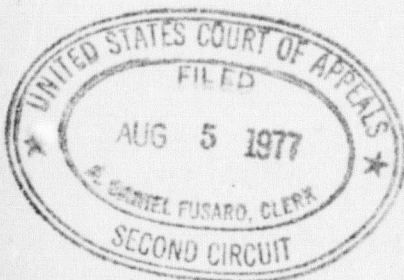
—against—

BENEFITS REVIEW BOARD; DIRECTOR, OFFICE OF WORKERS'
COMPENSATION PROGRAM; UNITED STATES DEPARTMENT
OF LABOR; SAMMIE L. GRAY; AND INSURANCE COMPANY
OF NORTH AMERICA,

Respondents.

APPEAL FROM THE BENEFITS REVIEW BOARD

**BRIEF FOR INSURANCE COMPANY OF
NORTH AMERICA, RESPONDENT**



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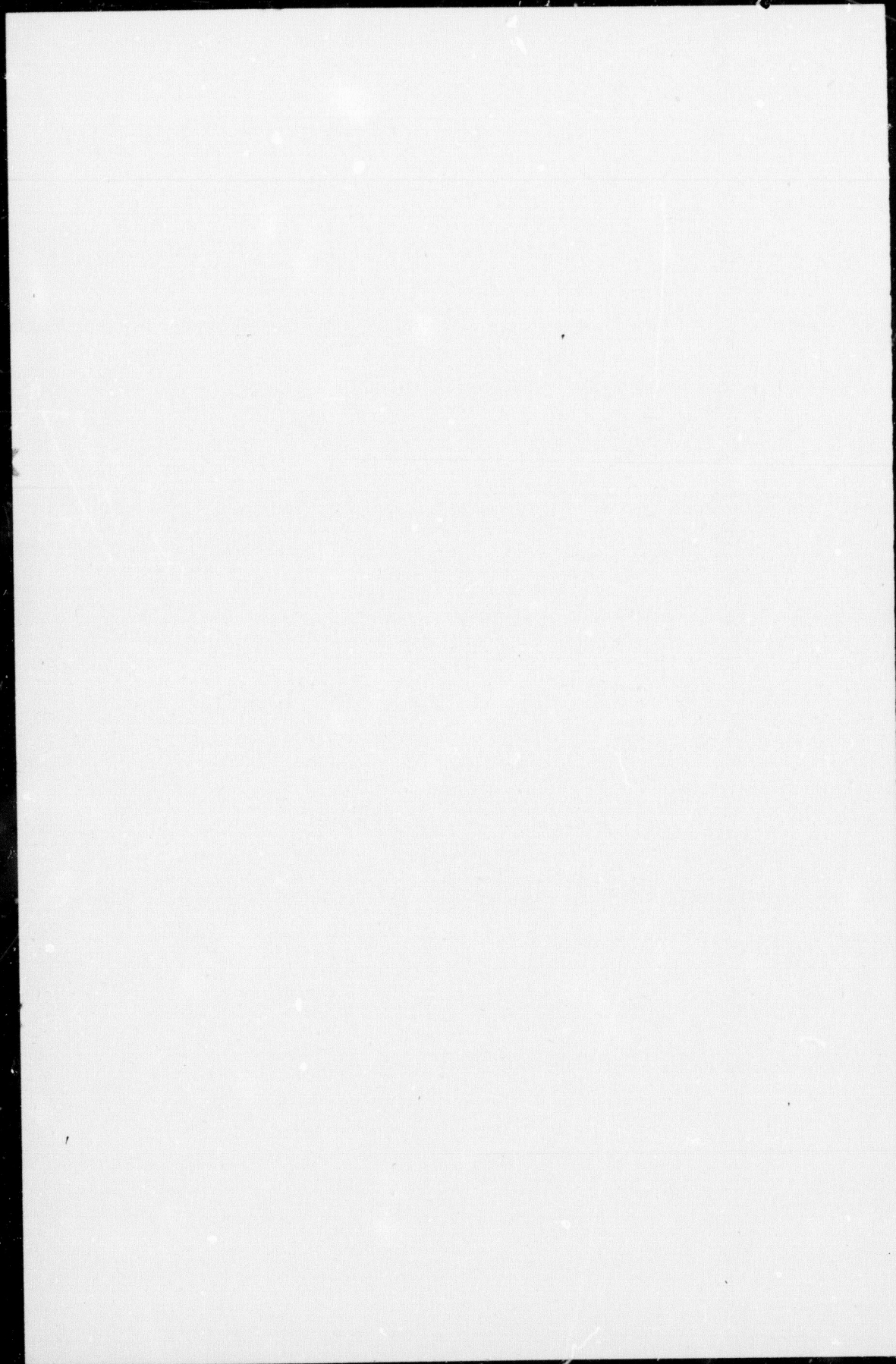
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GENERAL DYNAMICS CORPORATION, ELECTRIC BOAT DIVISION,

Petitioner,

—against—

BENEFITS REVIEW BOARD; DIRECTOR, OFFICE OF WORKERS'
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OF LABOR; SAMMIE L GRAY; AND INSURANCE COMPANY
OF NORTH AMERICA,

Respondents.

APPEAL FROM THE BENEFITS REVIEW BOARD

BRIEF FOR INSURANCE COMPANY OF NORTH AMERICA, RESPONDENT

Preliminary Statement

This is an appeal by General Dynamics Corporation, Electric Boat Division, as a self-insured employer, pursuant to 33 USC Section 921, from a decision of the Benefits Review Board, reported at 5 BRBS 279, which affirmed as modified the order and decision of the Administrative Law Judge (hereinafter Adm. Law Judge), Peter C. McC. Giesey dated December 18, 1975 (75-LHCA-571 and 572).

The Benefits Review Board found Mr. Sammie Gray, an employee of General Dynamics since 1962, had the occupational disease of asbestosis and was permanently, totally

disabled therefrom. It also found General Dynamics, as self-insurer, and not its carrier, the Insurance Company of North America, was liable for the entire award.

Statement of Facts

Sammie L. Gray was employed by the Electric Boat Division of the General Dynamics Corporation from 1962 until about 1969; and from 1970 until about March 20, 1973; and from May 1, 1973 to September 27, 1973 installing asbestos insulation in vessels (127-131a) *

The Insurance Company of North America went off the risk on April 1, 1973 when the General Dynamics Corporation, pursuant to the Longshoremen's and Harbor Workers' Compensation Act (hereinafter the LHWCA) 33 USC Sec. 932 (a) (1) (111a) became a self-insurer pursuant to 33 USC Section 932 (a) (2) for the purposes of workmen's compensation under the LHWCA.

The Lawrence Memorial Hospital Records indicate that in March of 1973, Mr. Gray was having pain in chest and stomach which was undiagnosed nor was the patient aware or told by any physician as to the cause of such pain (62a, 63a, 137a, 138a).

The hospital records and those of Dr. Philip Barry Wade, indicate that Mr. Gary's visits to the Lawrence Memorial Hospital with the various complaints that he had and of the medical attention and x-rays that were taken in connection with a determination of diagnosis occurred in the months of September and October 1973 and thereafter in the year 1974, after the Insurance Company of North America went off the risk on April 1, 1973, (62a, 63a, 64a,

* Reference are to pages in the Appendix.

65a, 66a, 67a, 68a, 69a, 70a, 71a, 72a, 73a, 74a, 75a, 76a, 77a, 78a, 79a, 80a, 81a, 82a, 83a, 84a, 85a, 86a, 87a, 88a, 89a, 90a, 91a, 92a, 93a, 94a, 95a).

Issue Presented for Review

The issue in this case insofar as the Insurance Company of North America is concerned is that it was not on the risk from May 1 to September 27, 1973 during which period the claimant was exposed to injurious stimuli prior to the date on which the claimant became aware of the fact that he was suffering from an occupational disease arising out of his employment.

The Administrative Proceedings

By letter of April 1, 1974, Gray's attorney presented notice of intention to claim workmen's compensation benefits to the employer, General Dynamics (99a). This notice was acknowledged by letter of the employer dated April 16, 1974 and referred Mr. Gray's attorney to the INA and the employer's agent for compensation matters (100a). A notice of employee's injury, form 201, and claim for compensation, were delivered to General Dynamics by letter dated May 13, 1974 (101a). The Employer's First Report of Accident, form 202, dated June 11, 1974 was received in the Office of Workers' Compensation Program on June 13, 1974 (104a). General Dynamics filed a notice of controversy, form 207, dated June 14, 1974 (106a).

After several informal conferences this matter was referred to the Office of Adm. Law Judges by the Assistant Deputy Commissioner on June 5, 1975. A hearing was held before the Honorable Peter McC. Giesey, Adm. Law Judge, United States Department of Labor at New London, Conn. on September 11, 1975.

This hearing resulted in an order and decision by the Adm. Law Judge dated December 18, 1975 (10a). Both the claimant Mr. Gray and General Dynamics filed timely notices of appeal (146a, 148a) and petitions for review of the order with the Benefits Review Board (150a, 153a).

The Benefits Review Board issued its order and decision dated December 21, 1976 (1a). General Dynamics timely filed its notice of appeal to this Court pursuant to 33 USC Sec. 921 (Aa).

ARGUMENT

General Dynamics retained claimant at his old job, working with asbestos (127-131a). The last employer from May 1, 1973 to September 27, 1973 was General Dynamics.

The administrative law judge found that there was no substantial evidence on the record to support a finding of disease and disability before Mr. Gray ceased employment (13a).

* * * "The record demonstrates by a preponderance of credible evidence that the employer of Gray during the last employment in which he was exposed to injurious stimuli, prior to the date upon which Gray became aware of the fact that he was suffering from an occupational disease arising out of his employment, was the General Dynamics." * * * (13a)

The Benefits Review Board affirmed the administrative law judge's Decision and Order holding General Dynamics responsible for all compensation payments (8a).

The Act Section 21(b) (3) provides that Findings of fact of an administrative law judge are conclusive if supported by substantial evidence in the record as a whole,

applies to review in Court of Appeals (*Potenza v. United Terminal Inc.*, 524 F. 2d 1136).

A reviewing court should not set aside an inference drawn by the Commissioner because the opposite one is thought to be more reasonable; nor can the opposite inference be substituted by the Court because of a belief that the one chosen by the Deputy Commissioner is factually questionable. *Cardillo v. Liberty Mutual Co.*, 330 U.S. 469, 485 at page 477, 478.

* * * "It matters not that the basic facts from which the Deputy Commissioner draws this inference are undisputed rather than controverted. See *Boehm v. Commissioner*, 326 U.S. 287, 293. It is likewise immaterial that the facts permit the drawing of diverse inferences. The Deputy Commissioner alone is charged with the duty of initially selecting the inference which seems most reasonable and his choice, if otherwise sustainable, may not be disturbed by a reviewing court." * * * *Del Vecchio v. Bowers*, 296 U.S. 280, 287.

The administrative law judge's findings that General Dynamics is liable for the award was correct under the case of *Travelers Insurance Company v. Cardillo*, 275 F. 2d 137, 145 (2nd Cir. 1955), cert. denied 350 U.S. 913 (1955) (13a).

The reference to the case of *Aerojet General Shipyards Inc. v. O'Keefe*, 413 F. 2d 793 (5th Cir. 1969) distinguishes between "injury" and "disability", page 12 of Petitioner's Brief and *Urie v. Thompson*, 337 U.S. 163 (1947) relates to the date of injury for the purposes of the statute of limitations only (7a).

The General Dynamics relies principally upon the testimony of its medical expert, Dr. Edward A. Gaensler, to

support their claim that in his opinion considered by him in the retrospect and being purely hindsight that claimant was suffering from employment related asbestosis prior to April 1, 1973 which is not supported by the evidence in the record as a whole because undiagnosed by the attending physicians prior to that date and even after some time in September and October 1973 and 1974. (see page 2 of this Brief).

The testimony of Dr. Gaensler is wholly speculative and gives added support to the reason why Congress declined to adopt the following suggestion proffered by an employer representative at the judiciary hearing pertaining to the Act in question.

" * * * That the Act should contain a provision limiting the proportion of the total award for which a particular employer could be held liable, to the same ratio as the extent of the damage done during the period worked for that employer bore to the total disability. It was acknowledged that, absent such a provision, a 'last employer' would be liable for the full amount recoverable, even if the length of employment was so slight that, medically, the injury would, in all probability, not be attributable to that 'last employment.' Nevertheless, the Congress evidently declined to adopt the suggestion thus proffered; and it would seem a fair inference that the failure to amend was based upon a realization of the difficulties and delays which would inhere in the administration of the Act, were such a provision incorporated into it. Thus we conclude that Congress intended that the employer during the last employment in which claimant was exposed to injurious stimuli, prior to the date upon which the claimant became aware of the fact that he was suffering from an occupational disease arising naturally out

of his employment, should be liable for the full amount of the award." * * *

Travelers Insurance Company v. Cardillo, 225 Fed. 2d at Page 145 and refer to Hearing of Committee on the Judiciary of the House of Representatives, on H.R. 9498, 69th Congress, First Session, held April 8, 15, 22, 1926, page 145.

The Carrier respectfully submits that the reasoning of the Court in the *Cardillo* case supra, page 145 is sound:

"* * * There remains the question which carrier or carriers are responsible for the discharge of the duties and obligations of the 'last employer' in respect of his principal liability. Here we are frankly groping in the dark. But the conclusion already arrived at with respect to the liability of the employer may fairly be thought to mark the path to be followed here as well. If administrative ease of handling was a consideration of significance in the formation of the Act with reference to the liability of the employer, then there is small reason to suppose that it was the intention of Congress to inject into the determination of carrier liability the very same conjectural and unsatisfactory estimates which would have been involved in attempting to apportion liability among employers." * * *

Medical Testimony

The Deputy Commissioner is permitted to disregard medical testimony in proceeding under LHWCA and to rely on his own observation and other evidence before him in making his decision.

Ennis v. O'Hearne, C.A. Md. 1955, 223 F. 2d 755.

The Deputy Commissioner is not obliged to accept expert opinion's as correct.

Hudnell v. O'Hearne, D.C. Md. 1951, 99 F. Supp. 954.

The Deputy Commissioner is not bound by uncontradicted testimony of medical witnesses where other evidence warrants a different conclusion.

Ryan v. Stevedoring Co. v. Norton, D.C. Pa. 1943, 50 F. Supp. 221.

The Deputy Commissioner is not bound to accept medical testimony.

Southern S.S. Co. v. Norton, D.C. Pa. 1941, 41 F. Supp. 108.

The Deputy Commissioner is not bound to accept the opinion or theory of any particular medical examiner.

McCarthy Stevedoring Corp. v. Norton, D.C. Pa. 1940, 40 F. Supp. 960.

The Deputy Commissioner need not depend upon medical testimony alone.

Watson v. Gulf Stevedore Corp., C.A. Tex. 1968, 400 F. 2d, 649.

SUCCESSIVE EXPOSURE TO OCCUPATIONAL DISEASE

" * * * In the case of occupational disease, liability is most frequently assigned to the carrier who was on the risk when the disease resulted in disability, if the employment at the time of disability was of a kind contributing to the disease. It will be observed that, in broad outline, this is comparable to the "last injurious

exposure" rule discussed in the previous subsection except that it places more stress on the moment of disability. Occupational disease cases typically show a long history of exposure without actual disability, culminating in the enforced cessation of work on a definite date. In the search for an identifiable instant in time which can perform such necessary functions as to start claim periods running, establish claimant's right to benefits, determine which year's statute applies, and fix the employer and insurer liable for compensation, the date of disability has been found the most satisfactory. Legally it is the moment at which the right to benefits accrues; as to limitations, it is the moment at which in most instances the claimant ought to know he has a compensable claim, and, as to successive insurers, it has the one cardinal merit of being definite, while such other possible dates as that of the actual contraction of the disease are usually not susceptible to positive demonstration.

Among the conditions to which this rule has been applied are asbestosis, silicosis, pneumoconiosis, tuberculosis, arthritis, dermatitis, occupational loss of hearing, and various diseases produced by inhalation of chemicals and fumes.

It goes without saying that, before the last-injurious-exposure rule can be applied, there must have been some exposure of a kind contributing to the condition. So, if a silicosis claimant had been transferred to outside work or to work in a place where dust conditions were not harmful, the carrier on the risk during the later period will not be held liable. But, once the requirement of some contributing exposure has been met, courts applying this rule will not go on to weigh the relative amount or duration of the exposure under

various employers and carriers. As a result, in some cases carriers and employers that have been on the risk for relatively brief periods, perhaps only a few weeks, have nevertheless been charged with full liability for a condition that had developed over a number of years.

Since the onset of disability is the key factor in assessing liability under the last-injurious-exposure rule, it does not detract from the operation of this rule to show that the disease existed under a prior employer or carrier, or had become actually apparent, or had received medical treatment, or, indeed, as held in North Carolina, had already been the subject of a claim filed against the prior employer, so long as it had not resulted in disability." * * *

Larson's Workmen's Compensation Volume 4, Section 95.21, Pages 17-79 to 17-88.

The Petitioner claims the Insurance Company of North America did not submit proof as to injurious exposure from May to September of the last year of employment. Mr. Gray continued his employment with the General Dynamics in the occupation of pipelagging with the same type of working conditions until September 1973. (138a)

The disability was definitely determined to begin in 1973 when Judge Giesey declined to speculate when the asbestosis might first have been able to be diagnosed:

"* * * However, that may be, the evidence clearly demonstrates that he was disabled at the time he ceased employment in September 1973. I so find." * * * (13a)

The reasoning in the *Cardillo* case in imposing liability on the last employer in which the claimant was exposed to

injurious stimuli, such as in the present case, was sound, to avoid the difficulties and delays which would inhere in the administration of the Act and preclude the prompt payment of Compensation to employees injured in Maritime employment. 33 U.S.C. 914 (a).

General Dynamics saw fit to become self-insurer under Section 932 of the LHWC Act as Amended and as a self-insurer employer occupies the role of a successive insurance carrier that *Cardillo* indicated should be treated in the same manner as a successive employer. Under *Cardillo*, General Dynamics as self-insured employer should clearly be held responsible.

May we respectfully submit in addition to the *Cardillo* case further authorities in support of the Carrier's contention that the Electric Boat as the last self-insurer as being liable.

See the following authorities:

Federal: *Travelers Ins. Co. v. Cardillo*, 225 F. 2d 137 (2d Cir. 1955).

Underwriters at Lloyds v. Alaska Indus. Bd., 160 F. Supp. 248 (D. Alaska 1958). Last insurer was solely liable. *Travelers Ins. Co. v. Cardillo*, immediately supra quoted.

Arkansas: *Employers Lia. Assur. Corp. v. Employers Mut. Lia. Ins. Co.*, 232 Ark. 113, 334 S.W. 2d 701 (1960). While the employee's dermatitis appeared during a period insured by the previous carrier, the permanent disability did not occur until the second carrier was on the risk. Since there existed an injurious exposure during the second period, the second carrier was held fully liable.

Delaware: *Alloy Surfaces Co. v. Cicamore*, 221 A. 2d 480 (Del. 1966). Aetna had been on the risk for only a few weeks before claimant was hospitalized for a condition produced by continuous exposure to fumes over a period of years. The Court held Aetna exclusively liable, and denied its request for apportionment among other carriers previously on the risk. The carrier based its argument upon the occurrence of the word "injury" at crucial portions in the statute, concluding that the actual injury took place before it assumed the coverage of the risk. The Court, however, pointed out that the majority rule in occupational disease cases fixes liability as time of disability.

Kentucky: *Gregory v. Peabody Coal Co.*, 355 S.W. 2d 156 (Ky. 1962). A Coal miner had worked 30 years for one coal company, but only 25 days with the second company. The second company was held solely liable for the pneumoconiosis disability on the ground that last-injurious-exposure liability arises on the date of disablement "while working under conditions which would, regardless of the time element, cause such disease.

Osborne Mining Co. v. Davidson, 339 S.W. 2d 626 (Ky. 1960). The employee's first diagnosis of silicosis was in 1955, at a time when special election was necessary to come under the act's silicosis provisions. In 1956, the act was amended making election unnecessary. In 1958 the employee became disabled. The Parties' stipulation on appeal was broad enough to be construed to include a stipulation that the parties were under the 1956 amendment. The Court applied the last-injurious-exposure rule as required by the Kentucky statute.

Michigan: *Sosnowski v. Dandy Hamburger*, 384 Mich. 221, 180 N.W. 2d 761 (1970). Claimant developed der-

matitis over a period of two years. During that time the employer had two compensation carriers. The carrier having the coverage at the time of claimant's disablement was held to be liable for the entire amount of the compensation award.

Minnesota: *Bituminous Gas Corp. v. Hartford Acc. & Indemnity Co.*, 283 Minn. 307, 167 N.W. 2d 741 (1969). Claimant was exposed to conditions which caused his occupational disease from 1950 to 1960. From 1950 until 1955 Hartford was the employer's insurer and from 1955 until 1960 Bituminous was the carrier. The disease did not become disabling until 1960. Claimant held not to have "contracted" the occupational disease until 1960. Apportionment of benefits between the two carriers accordingly held precluded.

New York: *Mariani v. Solona Rubenstein, Inc.*, 19 A.D. 2d 916, 243 N.Y.S. 2d 964 (1963). Carrier on the risk on the date of the employee's disablement due to pneumocomiosis, rather than carrier on the risk on the previous date, when the employee first received medical treatment, held liable for compensation benefits.

Harris v. Silver Creek Precision Corp., 13 A.D. 2d 859, 214 N.Y.S. 2d 911 (1961). The claimant was first treated for dermatitis in 1957 but was not forced to quit work until 1958. Held, the date of disability was in 1958, not when treatments were commenced. The carrier insuring at the later date was held liable.

Taratino v. Em Cos Fashions, 9 A.D. 2d 810, 192 N.Y.S. 2d 881 (1959). It was proper for the board to set the date of disablement as the first date dermatitis adversely affected claimant's wage earnings.

Grego v. Travelers Ins. Co., 283 App. Div. 762, 128 N.Y.S. 2d 219 (1954). New York statute on silicosis provides that the employer in whose employ claimant was last exposed shall be liable. Court applied same rule to situation where there was continuity of employer but a change in insurers.

Edwards v. Catspano & Grow Constr. Co., 15 A.D. 2d 843, 224 N.Y.S. 2d 565 (1962). The claimant, a 51 year old tunnel worker, developed advanced silicosis. An award of total disability was charged against the latest employer. The employer contended that, according to an investigation by the New York State Division of Hygiene, there was no silicosis dust in the air where the claimant had been working. The claimant and a co-worker testified that power brushes were used to chip concrete forms which created dust to which the claimant was exposed. The court stated that while the claimant's silicosis was the result of many years of exposure to silica dust, the evidence was sufficient to find that the claimant was exposed to some dust containing silica while employed by the last employer. Award affirmed against the last employer.

North Carolina: *Willingham v. Bryan Rock & Sand Co.*, 240 N.C. 281, 82 S.E. 2d 68 (1954). After twenty years of employment by Bryan, deceased was found to have silicosis in the third stage. A compensation claim was filed against Bryan. Deceased then obtained employment with Salisbury Granite. During his employment with Salisbury Granite, he became totally disabled. Salisbury Granite was joined as defendant and held solely liable.

Oklahoma: *Friendly Chevrolet Co. v. Pointer*, 435 P. 2d 579 (Okla. 1967). Claimant worked for many years

as an automobile painter, and for the last two years worked in a poorly ventilated shop where he was exposed to paint spray and carbon monoxide fumes. This was held to have precipitated a disabling lung condition, although the prior employment contributed to the disease. Award for permanent partial disability against last employer affirmed.

South Carolina: *Glenn v. Columbia Silica Sand Co.*, 236 S.C. 13, 112 S.E. 2d 711 (1960). The employee had been exposed to silica dust for four years. The second insurance company had covered the risk during the last 4½ months of exposure. Held, the carrier was liable without apportionment.

Tennessee: *Wilson v. Van Buren County*, 198 Tenn. 179, 278 S.W. 2d 685 (1955). Insurance Carrier at time that employee was last injuriously exposed to silicosis solely liable, even though prior to this, but unknown to him, he had been suffering from the disease.

Tennessee Tanning Co. v. Potter, 206 Tenn. 620, 337 S.W. 2d 601 (1960). The last-injurious-exposure rule resulted in sole liability upon the second insurance carrier even though the disability was substantially and observably in existence prior to the effective date of the second carrier's policy.

CONCLUSION

The Respondent, Insurance Company of North America, respectfully asks this Court to sustain the finding of the Administrative Law Judge and the Benefits Review Board in finding and ruling that the liability rests with General

Dynamics for payment of compensation and other benefits
to Mr. Gray under the LHWC Act.

Respectful y submitted,

FRANK W. DALEY
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Dated: August 2, 1977
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CERTIFICATE OF SERVICE OF BRIEF

WE HEREBY CERTIFY that two (2) copies of the within brief were this date mailed to the following

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